AUG 1

No. 79-1963

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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1979

PRESIDIO BRIDGE COMPANY, PETITIONER

v.

SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECRETARY OF STATE IN OPPOSITION

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QUESTION PRESENTED

Whether the Secretary of State complied with the International Bridge Act and with Exec. Order No. 11423 in issuing a permit to construct and operate an international toll bridge over the Rio Grande River.

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OPINIONS BELOW

The court of appeals did not issue an opinion. The opinion of the district court (Pet. App. 3a-18a) is reported at 486 F. Supp. 288.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1980 (Pet. App. 1a). A petition for rehearing was denied on March 11, 1980 (Pet. App. 2a). The petition for a writ of certiorari was filed on June 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a company that operates an international toll bridge, asserts that the Secretary of State improperly issued a permit authorizing the construction and operation of a rival international bridge. The relevant facts are as follows.

1. Section 4 of the International Bridge Act of 1972, 33 U.S.C. 535b, provides that no international bridge may be constructed unless the President gives his approval. Section 3 of the same Act, 33 U.S.C. 535a, permits the States and their subdivisions to enter into agreements with the governments of Canada and Mexico concerning international bridges, subject to the approval of the Secretary of State. Prior to passage of the 1972 Act, the existing statutes provided that no international bridges could be constructed over the navigable waters of the United States without the prior consent of Congress itself. Bridge Act of 1906, 33 U.S.C. 491 *et seq.*; Section 508 of the General Bridge Act of 1946, 33 U.S.C. 531.

In 1968, while a legislative precursor of the International Bridge Act was still pending before Congress, the President issued Exec. Order No. 11423, 4 Weekly Comp.

of Pres. Doc. 1235 (Aug. 16, 1968), which delegated authority to the Secretary of State to issue permits for the construction of a variety of facilities connecting the United States with foreign countries. Pursuant to Section 1(a)(iv) of the Executive Order, the delegation extended to "bridges, to the extent that congressional authorization is not required."

The Executive Order establishes certain procedures for processing permit applications. Section 1(b) provides that the Secretary of State shall request the views of the heads of certain named agencies, and Section 1(c) provides that he may also consult with such other department and agency heads and with such state and local officials as he deems appropriate. After considering the views submitted by these officials, the Secretary of State is to make a proposed determination to grant or deny the permit, as the national interest may in his judgment require. The Secretary is then required to give notification of the proposed determination to the agencies identified in Section 1(b).[1] If these agencies register no objection, the Secretary's determination becomes effective. If an official required to be consulted disagrees, however, the application is to be referred to the President for his consideration and final decision. Exec. Order No. 11423 remains in effect and its procedures have been followed since 1972 in bridge cases.

2. By the Act of March 10, 1926, ch. 50, 44 Stat. 202, Congress granted petitioner's predecessors revocable permission to operate an international toll bridge over the Rio Grande connecting Presidio, Texas, with Ojinaga,

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[1]With regard to international bridges, Exec. Order No. 11423 requires the Secretary of State to "request the views of the Secretary of the Treasury, the Secretary of Defense, the Attorney General, and the Secretary of Transportation."

Mexico. In 1927, petitioner's predecessors erected a structure which was intended to serve as a temporary bridge until a permanent one could be constructed. Petitioner Presidio Bridge Company continues to operate the American portion of this "temporary" bridge (Pet. App. 4a).

In 1973, pursuant to the International Bridge Act and Exec. Order No. 11423, Presidio County, Texas, applied to the Secretary of State for a permit to construct and operate an international toll bridge in cooperation with the Republic of Mexico at a location just upstream of the existing structure. If opened, the new bridge will effectively put petitioner out of business, because Mexico has announced that it intends to close its side of the present bridge if a new bridge is opened (Pet. App. 7a).

3. Petitioner notified the Secretary of State of its opposition to Presidio County's application. In 1976, after seeking the views of federal and local agencies, the Secretary held a public hearing at petitioner's request and subsequently determined that the permit should issue. The recommended permit was then circulated to certain federal agencies pursuant to Exec. Order No. 11423. Finding that none of the consulted federal agencies objected, the Secretary issued a permit to Presidio County on July 26, 1976 (Pet. App. 7a).

4. Petitioner brought this action in the district court on August 14, 1976 (Pet. App. 7a), contending that the permit granted Presidio County was null and void. Petitioner argued that Exec. Order No. 11423 did not validly delegate the President's authority to issue permits for international bridges because the Order was issued prior to enactment of the International Bridge Act. Petitioner also contended, among other things, that the Department of Transportation and the Department of the Treasury had objected to issuance of the permit and that

therefore, under the terms of the Executive Order, the Secretary was obligated to submit the matter to the President for decision.

5. The district court rejected petitioner's arguments and entered summary judgment in favor of the Secretary (Pet. App. 3a-18a). The court held that Exec. Order No. 11423 was issued in anticipation of the enactment of the International Bridge Act and was a valid delegation of authority (Pet. App. 12a-13a). The court also found that no federal agency had objected to issuance of the permit and, therefore, the Secretary was not required to refer the matter to the President for decision (Pet. App. 13a-17a). In so holding, the court relied, in part, upon affidavits of responsible officers of the Departments of the Treasury and of Transportation, which stated that the responses of their respective agencies did not, and were not intended to, constitute agency objections for purposes of the Executive Order.[2]

The court of appeals affirmed without opinion (Pet. App. 1a) and denied a petition for rehearing en banc (Pet. App. 2a).

ARGUMENT

The decision below is correct, does not conflict with any decision of this Court or any court of appeals, and does not present any question warranting review by this Court.

1. Petitioner asserts (Pet. 4) that Exec. Order No. 11423 was an ineffective attempt to delegate authority because, at the time it was issued, the existing law

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[2]The district court also found that petitioner lacked standing to assert a claim under the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* (Pet. App. 10a-11a). Petitioner did not appeal this ruling.

provided that congressional consent was required for all international bridges over navigable waters. But the Order did not purport to allow the Secretary to defy existing laws; it extended to bridges only "to the extent that congressional authorization is not required." As the district court observed (Pet. App. 12a-13a), that portion of the Order concerning international bridges was clearly issued in anticipation of the enactment of the International Bridge Act. Petitioner has cited no authority that would bar an anticipatory delegation of presidential authority and no legitimate purpose would be served by creating one here. Indeed, in the absence of any express delegation, the actions taken by responsible federal officers on behalf of the President will be deemed valid and legally effective unless Congress or the President has expressly provided otherwise. *The Confiscation Cases*, 87 U.S. (20 Wall.) 92, 109 (1873); *Wilcox* v. *Jackson*, 38 U.S. (13 Pet.) 498, 513 (1839). Hence, once the 1972 Act was passed, the Secretary was free to act without any express delegation from the President.

2. Petitioner's assertion (Pet. 4-5) that the Departments of the Treasury and of Transportation objected to the issuance of the permit is baseless; the responses of those agencies (Pet. App. 15a) show on their faces that the agencies did not object to the permit. Likewise, petitioner's argument that the affidavits of the officers of those departments—stating that the responses of their agencies were not intended to convey any objections—were inadmissible for lack of first-hand knowledge and for other purported defects is equally groundless and was properly rejected by the district court (Pet. App. 15a-17a). In any event, such narrow fact-bound issues do not raise questions appropriate for review in this Court. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

3. Finally, petitioner asserts (Pet. 5) that the International Bridge Act requires the Secretary to approve an agreement between Presidio County and Mexico prior to issuing the permit. This argument was not raised at the administrative level and thus may not be raised here. *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). Moreover, the Act does not require the Secretary to approve any proposed agreements prior to issuing a permit. Section 3 of the Act, 33 U.S.C. 535a, merely provides that such international agreements as may be entered into between foreign governments and a state or its subdivisions regarding international bridges do not become effective until they are approved by the Secretary of State; it does not provide that such an agreement must be in effect before any permit may be issued under Section 4 of the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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